BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

No opinion was rendered by the United States District Court for the District of Arizona. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. Vol. II 14) has not as yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Amended (28 U. S. C., Sec. 347). The order of the Circuit Court of Appeals sought to be reviewed was entered on December 26, 1945 (R. Vol. II 24).

Statement of Facts

Statement of facts and questions presented appears in the petition.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that an election under Chapter IV, Section I, Paragraph 25 of the Charter of the City of Tucson, authorizing the City to acquire the utility properties of petitioner, was not prerequisite to the authority of the City to initiate the condemnation action.

2. In holding that respondent may condemn petitioner's utility properties located outside the municipality of Tucson, and now devoted to public use, and reduce the utility service in such outside territory from public use to private use, in violation of the provision of the Constitution of the State of Arizona that private property shall not be taken for private use.

3. In holding that respondent had the right to institute proceedings to condemn petitioner's utility properties in the absence of an election under the Arizona Municipal Revenue Bond Act, authorizing the issuance of revenue bonds with which to finance the acquisition of the utility properties.

4. In holding that the provision of the Arizona law of eminent domain, fixing the value of petitioner's property as of the date of summons in the action, is valid and not in violation of the just compensation clause of the State Constitution, and not in violation of the due process clauses of the State and Federal Constitutions.

Argument

1. Respondent Had No Authority to Initiate the Condemnation Action in the Absence of an Election Authorizing It So to Do.

The Charter of the City of Tucson provides that no public utility shall be purchased, leased, acquired, sold, or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted (App. p. 21). The complaint contains no allegation that such

election had been held. The Charter is controlling because the acquisition and operation of a public utility property is a proprietary function of a municipal corporation, and therefore, a local matter.

In the case of *City of Tucson, a body politic and corporate, Appellant,* v. *Tucson Sunshine Climate Club, a Corporation, Appellee,* No. 4792, decided December 21, 1945, but not yet reported, the Arizona Supreme Court held:

"The rule has been announced in *Luhrs* v. *City of Phoenix,* 52 Ariz. 438, 83 Pac. 2d 283, that if an activity is carried on by a municipality as the agent of the state it is of general or public concern, but it is of local concern if exercised by the city in its proprietary capacity:" . . .

> '. . . The courts differ as to what activities of the city are of local interest or concern and therefore free from legislative interference. Some of such activities are so noticeably local or state-wide that they are easily assignable, while in others the line of demarcation is very difficult of discernment, because the activity may be neither predominantly local nor state-wide but may partake of both. Whether it is one or the other in such case depends upon whether the activity is carried on by the municipality as an agent of the state. If it is, it is of general or public concern. If it is exercised by the city in its proprietary capacity, it is a power incidental to home rule. *State* v. *City Council of Helena,* 102 Mont. 27, 55 P. 2d 671 . . .'"

". . . This court, and most courts speaking upon the subject, have held that a home rule city deriving its powers from the constitution, is independent of the state legislature as to all subjects of strictly local municipal concern. *Luhrs* v. *City of Phoenix, supra; Clayton* v.

State, supra; Consumers Coal Co. v. *Lincoln,* 109 Neb. 51, 189 N. W. 643; *Axberg et al.* v. *City of Lincoln,* 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894; 37 Am. Jur. 715-716, Section 106, Municipal Corporations."

The decision of the Circuit Court of Appeals is in conflict with the above holding and the other decisions of the Arizona Supreme Court cited therein, inasmuch as the Circuit Court of Appeals held that the acquisition and operation by the City of Tucson of the petitioner's utility properties was a matter of general and statewide concern, so that the provisions of the Revenue Bond Act controlled, to the exclusion of and in contravention of the provisions of the respondent's charter.

2. The Circuit Court of Appeals Erred In Holding That Respondent Might Condemn the Private Property of Petitioner Located Outside the Municipality and Convert Its Service From Public Use to Private Use In Violation of the Constitution of Arizona.

The complaint on its face (R. Vol. I, pp. 3, 16, 18) shows that a substantial part of petitioner's utility properties lies outside the municipality of respondent. It shows (R. Vol. I, p. 16) that petitioner's electric services extend into the three counties of Pinal, Santa Cruz and Cochise, Arizona, in addition to the County of Pima, where Tucson is located, and that such outside properties include a 67 mile, 45,000-volt transmission line extending from Tucson to the City of Nogales, Santa Cruz County, and the distribution and branch lines thereof (R. Vol. I, p. 14); it shows that the petitioner's gas services extend into the County of Pinal; it alleges that petitioner is engaged in supplying electric and gas services to consumers located outside of the City of Tucson (R. Vol. I, p. 3); it alleges that the taking of petitioner's property is necessary in order that the City of Tucson

may supply electricity and natural and artificial gas not only to its inhabitants "but to consumers located outside of said city and within the State of Arizona" (R. Vol. I, p. 18).

Section 17, Article 2 of the State Constitution (App. p. 41) provides that private property shall not be taken for private use, except for certain purposes not here involved.

The Arizona Constitution further provides (App. 42):

> "Whenever an attempt is made to take private property for a use alleged to be public, *the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.*" (Emphasis ours.)

It has been judicially determined in Arizona that utility service municipally operated outside the corporate limits of the municipality is a private and contractual service and not a public service in any sense.

This was squarely held by the Supreme Court of Arizona in *City of Phoenix, et al.* v. *Kasun, et al.* (1939), 54 Arizona 470, 97 Pac. 2d 210.

The City of Phoenix was furnishing water service outside the corporate limits of the municipality and had adopted an ordinance increasing the water rates to be paid by consumers outside the city limits. In a suit to enjoin the enforcement of such higher rates and to review the same the Court held that the service rendered by the city outside of its corporate limits was a purely private contractual service and not a public one and that, therefore, the rate was not subject to review by the courts.

The Court said (97 Pac. 2d 212):

> "A municipality may not compel consumers out-

side of its corporate limits to purchase water from it, nor can it be compelled to furnish such water to non-residents. A municipality can only dispose of its surplus water outside of its corporate limits subject to the prior rights of its inhabitants in case of shortage. We think these propositions are either declared specifically or impliedly by the cases of *City of Phoenix* v. *Wright,* 52 Arix. 227, 80 P. 2d 390; *Crandall* v. *Town of Safford,* 47 Ariz. 402, 56 P. 2d 660; *City of Tucson* v. *Sims,* 39 Ariz. 168, 4 P. 2d 673; *Menderson* v. *City of Phoenix,* 51 Ariz. 280, 76 P. 2d 321."

* * * *

"The distinguishing characteristic of a public utility is the devotion of private property by the owner to such a use that the public generally, or at least that part of the public which has been served and has accepted the service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges. When private property is thus devoted to the public use, certain reciprocal rights and duties are raised by implication of law as between the utility and the persons whom it serves, and no contract is necessary to give them."

And on page 214 the Court, after reviewing the authorities, stated:

"After a careful consideration of all the authorities, we are of the opinion that the controlling factors in the present case are that the city was under no obligation, as a matter of law, to furnish any service to the plaintiffs; that the relationship between them was purely contractual in its nature, and that such being the case, the reasonableness or unreasonableness of the rates fixed by the contract are not subject to review by the court."

Since, under the Arizona Constitution, the question is one for judicial determination, the decisions of the Arizona courts are necessarily decisive on this question.

In complete disregard of these constitutional provisions the Circuit Court of Appeals held (R. Vol. II, page 21):

> "It is our view *that the legislature must have considered* that Appellee's whole utility is put to a higher use when operated by a municipality, though as to some part of it customers outside the city limits are no longer under the public service laws formerly controlling their service." (Emphasis ours.)

If it be assumed that the Arizona legislature in the Revenue Bond Act in effect declared that the proposed use is a "higher use", the Arizona Constitution has specifically put such a declaration beyond the power of the legislature. The disregard by the Circuit Court of Appeals to the plain language of the Arizona Constitution and its failure to follow the decisions of the Supreme Court of Arizona constitute reversible error of a type which should be corrected by this Court on certiorari.

3. The Condemnation Action Instituted By Respondent Is Void Because the Arizona Municipal Revenue Bond Act Is Violative of the Arizona Constitutional Provision Providing for Just Compensation, and the Due Process Clauses of Both the State and Federal Constitutions, In That Neither Certainty of Compensation Nor Any Remedy for the Enforcement of Payment for the Property Is Provided For.

The Revenue Bond Act, as construed by the Circuit Court of Appeals, makes no provision for certainty of compensation to petitioner, after the value of the property has been finally determined by the court. The Revenue Bond Act permits the respondent to attempt

to finance the acquisition of the property for a period of eighteen months (Sec. 16-604, App. p. 40, made a part of the Revenue Bond Act by Sec. 16-2603, App. p. 22) after the final judgment of valuation.

No election to authorize the issuance of bonds may ever be held, and if one is held, the authorization may be denied by the real property taxpayer electors of the municipality.

The judgment is not a general obligation against the municipality, by virtue of Section 16-2617 (App. p. 28). Under this procedure, a municipality may cast a cloud upon a private utility property by maintaining litigation in eminent domain for a period of several years, and for eighteen months after the litigation is terminated, thereby preventing the owner from disposing of his property to another, and finally deciding not to take the property, or as the result of a vote against issuing revenue bonds if an election is held, find itself unable to finance the acquisition.

> "Laws failing to provide the property owner with an adequate remedy for the enforcement of the payment of damages are violative of the state and federal constitutions, prohibiting the taking of private property without just compensation."
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> *Wright* v. *Donaldson,* 144 Tenn. 239, 230 S. W. 605.
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> "The purposes of the Constitution are to place the citizen in a position to demand and receive compensation; that the enabling statutes shall point out the persons who shall pay the compensation, and at the same time furnish the remedy for the enforcement of that payment. None of these things are done by the eighth section of the act, and it is therefore unconstitutional and void."
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> *Tuttle* v. *Knox County,* 89 Tenn. 157, 14 S. W. 486.

In *Connecticut River R. Co.* v. *Franklin County,* 127 Mass. 50, at page 55, 34 Am. Rep. 338, the court said:

> "It is sufficient that the statute which authorized the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the commonwealth, and authorize the Governor to draw his warrant therefor. . . . But in the statute before us there is no pledge of the faith and credit of the commonwealth, no appropriation of the general funds in its treasury, and no authority to the Governor to draw his warrant for the payment of the damages out of such funds. On the contrary, the very terms of the statute preclude the inference of any such pledge, appropriation, or authority, by directing that the land taken for the union passenger station shall be paid for from the earnings of the Troy & Greenfield Railroad and Hoosac Tunnel, and appropriating for the purposes of the act a sum not exceeding $9,000 to be paid out of those earnings. Stat. 1878, Chap. 277, secs. 6, 8. The fact, admitted by the parties, that those earnings will probably be sufficient to meet and extinguish all claims for damages for lands so taken, falls short of satisfying the requirement of the Constitution that the owner of property taken for the use of the public shall have a prompt and certain compensation, without being subject to any risk or unreasonable delay."

4. The Provision of the Arizona Eminent Domain Law Fixing Compensation and Damages as of the Date of the Summons Violates the Just Compensation Clause of the State Constitution and the Due Process Clauses of the State and Federal Constitutions.

The Revenue Bond Act provides for the condemnation of utility properties but beyond that simple statement relegates the procedure to be followed in condemnation

to the eminent domain law of Arizona. This provides that damages and value shall be fixed as of the date of issuance of the summons in the action and that no improvements placed upon the property thereafter shall be included in the assessment of damages and compensation. (Sec. 27-916, App. p. 37).

The owner of a public utility property is, therefore, precluded from being compensated for additions, betterments and extensions required to be made after the date of summons.

The Circuit Court of Appeals airily dismisses this shocking result with the statement that "The public utility corporation, with its peculiar privileges under the Arizona laws, must take the unfavorable with the favorable when it seeks to act under such laws" (R. Vol. II, 20).

This law, when applied to the taking of public utility property, violates Section 17, of Article 2 of the State Constitution (App. p. 41), providing:

> . . . **That no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into the court for the owner.** . . .

This law is likewise violative of Section 4 of Article 2 of the Arizona Constitution (App. p. 41) and of **Section 1, of Article 14, of the Constitution of the United States** (App. p. 42) as denying to petitioner due process of law.

In *Passaic Consol.* v. *McCutcheon*, 145 N. J. L. 137, 144 Atl. 571, the court held that a New Jersey eminent domain statute, which provided that damages and compensation were to be fixed as of the date of filing the petition, was unconstitutional in that it deprived the owner of compensation for betterment and improvements made

during the progress of the litigation. The court said at p. 573:

> "It is not unlikely that two years or more would pass before the final termination of the controversy. In the meantime the water company is under the duty and subject to the orders of the Public Utility Commission to make such extensions, improvements, and betterments as may be required to render adequate service to the communities it serves. To refuse to do so because of the pending proceedings would be no defense to the orders. Failure to provide a method by which the owner can be reimbursed for the extension and betterments it is obliged to make during the pendency of the proceedings is a serious matter, and deprives the water company of just compensation for its property if the statute cannot be so construed as to include such payments."

Failure to compensate for additions and betterments is peculiarly unjust where, as here, the owner must suffer not only the delay involved in a necessarily complicated trial as to the value of the public utility property but also an additional arbitrary period of 18 months during which the condemnor may arrange its financing.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted.

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